BOARD OF ALIEN LABOR CERTIFICATION APPEALS
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

DATE: February 26, 1997

CASE NO: 95-INA-544

In the Matter of:

WILLIAM H. VASAN VLECK, INC.
Employer,

On Behalf of:

DAVID SCHESTENGER,
Alien

Appearance: Martin C. Liu, Esq.
New York, New York,
for the Employer and the Alien

Before: Holmes, Huddleston and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien David Schestenger ("Alien") filed by Employer William H. Van Vleck, Inc. ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, New York, denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 CFR § 656.27(c).

STATEMENT OF THE CASE

On December 31, 1993, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Assistant Manager , Liquor and Wine Store. The duties of the job offered were described as follows:

> Supervise store; plan and prepare work schedule for employees; formulate pricing policies; coordinate sales promotion; monitor inventory levels and requisition items; responsible for stocking and shelf display; Maintain operating records; help customers in making selections; establish and maintain security; hire and fire personnel and train new staff. (AF-1-86)

On January 23, 1995, the CO issued a NOF denying certification, finding that the job offer was responded to by 24 applicants at the New York State Department of Labor. At least six of these were rejected without benefit of interview even though they were at least as well qualified as alien was at time of hire. Employer indicated another applicant failed to report for a scheduled interview. However, the applicant indicates she was never contacted by Employer. The Co required documentation that the applicants at time of consideration were not qualified, willing or available. (AF-88-90)

Employer, March 29, 1995, alleged that all six applicants lacked the minimum requirement of three years experience in the job offered or related experience. Employer also gave a sworn statement that the applicant Ms. Harriet Schorr had been contacted for an interview. (AF-91-96)

A Final Determination was issued April 10, 1995, finding that at least three of the applicants, Dorothy Slaughter- Addison, Jose Rivera and Nester Solis had three or more years combination sales and accounts clerk experience and were therefore qualified for the job. (AF-97,98)

Employer, May 22, 1995 requested review of the Final Denial. (AF-99-122)

Discussion

The regulations provide in 656.21(b)(6) that if U.S. workers have applied for the job opportunity, an employer must document that they were rejected solely for lawful, job-related reasons. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. workers. Therefore, an employer must take steps to ensure that it has rejected U.S. applicants only for lawful, job-related reasons. The employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. Cathay Carpet Mill, Inc., 87-INA-161 (Dec. 7, 1988)(en banc).

As a practical matter, we note that 24 applications were initially received for this opportunity which did not require significant training and only three years experience. Employer's mere assertions that applicants were not qualified is not sufficient documentation. For example, in its brief, Employer indicates that applicant Nestor Solis had only 32 months qualifying experience. Employer rejected his experience, incorrectly we believe, as a clerk in an accounting firm. Further, Employer did not deign to interview applicant to determine if additional employment beyond that specifically listed on applicant's short resume had been accomplished by this applicant.

With respect to applicant Schorr, where an employer's statements concerning contact of an applicant during recruitment are contradictory to and unsupported by the applicant's statements, the CO may properly give greater weight to applicant's statements that they were not contacted. Robert B. Fry, Jr. 89-INA-6 (Dec.28, 1989).

Finally, as pointed out by the CO, alien's experience before being hired by Employer was less than a year as a sales person in a jewelry store and six years as a "checker of accounts" in a hotel, verifying and recording transactions, experience less qualifying than that rejected for applicant Solis.

Accordingly, we find the Employer has failed to establish a good faith effort to recruit qualified U.S. workers for the job opportunity. Thus the COs denial of labor certification must be affirmed.

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

_____
JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk

Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: **Alice M. Synnott (Claudia Olivera)**

Case No. : 95-INA-235

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: